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No. 03-8661

IN THE

Supreme Court of the United States

MELVIN T. SMITH,
Petitioner,
v.
COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON WRIT OF CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

In a jury trial, may the judge reconsider her legal ruling allowing a motion for directed verdict and submit the charge to the original jury without twice placing the defendant in jeopardy?

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Petitioner Melvin Smith's girlfriend and co-defendant, Felicia Brown, lived with her family in a triple decker dwelling in the Jamaica Plain section of Boston. J.A. 104, 121-22. On the date of the shooting, the victim, Christopher Robinson, who was Brown's cousin, was staying at the house while Brown's mother was away. Trial Transcript, volume 2, pages 52-53 (hereinafter cited as "Tr. volume/page").

At 4:00 a.m. on August 16, 1996, Robinson went down the stairs from the third floor of the house to lie down. J.A. 122. As he reached the bottom of the stairs, he saw Brown and Smith in Brown's bedroom. J.A. 12. Smith was holding what appeared to be a .38 or .32 caliber pistol. J.A. 12, 13, 14, 16-17, 122. As soon as Robinson got down to the second floor, Smith shot him three times. J.A. 12. Smith then said to Brown, "let's go." J.A.

13. Robinson said, "I know who you are, Melvin. Why you shoot me? Why you shoot me? I know who you are. Your name is Melvin." J.A. 122. The shooting caused Robinson severe injuries, destroying his digestive tract. J.A. 122.

On September 26, 1996, a grand jury indicted Smith for armed assault with intent to murder and assault and battery by means of a dangerous weapon. J.A. 120-21. On October 8, 1998, a grand jury indicted him for unlawfully possessing a firearm (fourth offense).[1] J.A. 9-10. Smith's trial before a jury began on November 4, 1998. J.A. 2. The victim, Christopher Robinson, testified during the Commonwealth's case that Smith was the person who shot him and that the gun Smith used to shoot him was a "pistol," a "revolver," and a ".32 or a .38." J.A. 12, 13, 14, 16-17, 122, 124. After the Commonwealth rested, Smith moved for required findings of not guilty as to all indictments. J.A. 20. As to the indictment for unlawful possession of a firearm, Smith argued that the Commonwealth had not presented direct evidence that the gun barrel's length was less than sixteen inches, an element of the offense. J.A. 20-21, 98-101. After a brief hearing outside the presence of the jury, the trial judge allowed the motion. J.A. 22. Her decision was noted on the face of the motion by the clerk and ultimately entered on the docket, but was not communicated to the jury. J.A. 3, 22, 123.[2]

The trial continued that same morning. J.A. 22. Smith himself presented no witnesses, while Felicia Brown, who was

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[1]The Commonwealth initially indicted Smith for unlawfully possessing a firearm (third offense), but entered a *nolle prosequi* and re-indicted for a fourth offense violation in order to account for Smith's three prior convictions. Tr. 1/4-10.

[2]The judge denied Smith's separate motion for required finding of not guilty as to his indictments for assault with intent to murder and assault and battery by means of a dangerous weapon. J.A. 22. Smith did not appeal the denial of that separate motion.

charged with being an accessory after the fact, called her mother to testify. J.A. 22-58, 121. That afternoon, after the defense rested, J.A. 58-59, but before closing arguments and the jury charge, the prosecutor presented the trial judge with a Massachusetts Supreme Judicial Court case which held that evidence that the gun was a "handgun" or a "revolver" would suffice to satisfy the element of the offense regarding gun-barrel length. J.A. 71. The trial judge heard argument from counsel about the import of the Supreme Judicial Court decision, along with the cases initially cited by Smith in his motion, one of which concerned a shotgun and two of which were concerned with a conceded absence of evidence regarding gun-barrel length. J.A. 71-74. At the end of this discussion about the law governing this element, the trial judge determined that she should submit the charge to the jury. J.A. 74. Smith neither objected nor asked to present evidence in his defense.[3] *Id.*

The next day, while the jury was deliberating, Smith asked the trial judge to reconsider her decision to submit the firearm charge to the jury, citing further authority regarding proof of gun-barrel length for the court's consideration. J.A. 81. After hearing further argument from counsel, the judge took the matter under advisement. J.A. 89. On the next trial day, the judge denied

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[3]At this point, Smith did ask to further argue two other points that were contained in his written motion for required finding as to this charge, namely assertions that he was either "at home" or was Brown's guest when he shot Robinson. Either assertion, he claimed, entitled him to an exemption from the statute's provisions. J.A. 75-76, 99-100. Neither theory was supported by the evidence and neither was raised to the Massachusetts Appeals Court on appeal. (Because Smith failed to present these points to the Appeals Court for its review, this Court should not consider them here. *See Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]").) After acknowledging that she understood these alternative bases for Smith's motion, the trial judge reiterated that the motion was denied. J.A. 76.

Smith's motion to reconsider. J.A. 92. That same day, the jury convicted Smith of all charges. J.A. 93-95, 102.

Smith waived a jury trial as to the statutorily mandated separate proceeding concerning whether his firearm conviction was his fourth such offense, and the court convicted him after hearing the evidence of his three prior convictions for unlawful possession of a firearm.[4] J.A. 96. The trial judge sentenced Smith to twelve to fifteen years for his conviction for armed assault with intent to murder, to a concurrent nine to ten years for his conviction for assault and battery by means of a dangerous weapon, and to a concurrent ten to twelve years for the firearm charge.[5] J.A. 96-97.

After his trial, Smith filed a motion for new trial, asserting among other matters that his double jeopardy rights were violated by the trial judge's reconsideration of her initial grant of his motion for a required finding as to the firearm charge. J.A. 7, 107. The trial judge denied the motion, determining that no such violation occurred because Smith was not subjected to a second trial, because the court's error was corrected before closing arguments, and because Smith had the option to re-open his case. J.A. 107-11.

The Appeals Court affirmed both the trial court's denial of Smith's motion for new trial and his convictions. J.A. 120-38. As to Smith's double jeopardy claim, the court determined that no such violation occurred "because the judge's correction of her

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[4]In Massachusetts, a defendant who is indicted for and convicted of a crime that will expose him to a greater sentence due to his prior conviction(s) for the same crime is entitled to a separate jury trial, with all the protections attendant at criminal trials, concerning whether his conviction is a "subsequent offense." MASS. GEN. LAWS ch. 278, § 11A.

[5]Christopher Robinson subsequently died from the injuries he suffered in the shooting. Smith has been indicted for first-degree murder, which indictment currently is awaiting trial. J.A. 105.

ruling did not require a second proceeding," J.A. 125, and noted that Smith had "'no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.'" *Id.* (quoting *United States* v. *Wilson*, 420 U.S. 332, 345 (1975)).

Smith also claimed that reconsideration violated Massachusetts Rule of Criminal Procedure 25, the rule governing motions for required findings of not guilty. J.A. 114 n.11. The Appeals Court rejected this state-law claim, holding that the purpose served by the rule, namely, "'to insist that the Commonwealth present proof of every element of the crime with which he is charged before he decides whether to rest or to introduce proof in a contradiction or exoneration,'" was served in this case. J.A. 126 (quoting *Commonwealth* v. *Cote*, 15 Mass. App. Ct. 229, 240, 444 N.E.2d 1282, 1289-90 (1983)). Specifically, the court highlighted the facts that Smith made no suggestion that his trial strategy as to the other charges was altered by the trial judge's actions and that he had an opportunity to re-open his case. *Id.* The court further held that nothing about Rule 25 precluded a trial judge from exercising her power to correct a ruling in this manner. *Id.* In this regard, the court observed that the evidence concerning the firearm charge was sufficient as a matter of law and that Smith was not prejudiced by the correction where the jury was never informed of the trial judge's actions and the correction occurred before closing arguments. J.A. 126-27.

The Massachusetts Supreme Judicial Court denied Smith's application for leave to obtain further appellate review on October 3, 2003. *Commonwealth* v. *Smith*, 440 Mass. 1104, 797 N.E.2d 380 (2003). On December 31, 2003, Smith filed a petition in this Court seeking a writ of certiorari, which this Court granted on June 14, 2004.

SUMMARY OF THE ARGUMENT

1. The Double Jeopardy Clause encompasses the universal maxim that no person should be placed in jeopardy twice for the same offense. A defendant's right to have his particular tribunal held together until it determines the facts of the offenses he faces helps to effectuate this maxim, because it is the link between the two separate but related concerns that fuel the Double Jeopardy Clause's prohibition against second prosecutions. First, the Double Jeopardy Clause embodies a res judicata principle of respecting final factual determinations, whether of guilt or of innocence. Second, the Clause protects against government oppression by barring the prosecution from multiple opportunities to convict a defendant, either by improving its case or by finding a more sympathetic jury.

2. Thus, final judgments of acquittal are entitled to deference, because of the risk of a second trial that would exist if review of such factual resolutions regarding the charged offenses were permitted. Only those determinations that "'actually represent a resolution, correct or not, of some or all of the factual elements of the offense charged,'" however, constitute acquittals for double jeopardy purposes. *Lee* v. *United States*, 432 U.S. 23, 30 n.8 (1977) (quoting *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)). For several reasons, a trial judge's mid-jury trial legal ruling granting a motion for directed verdict does not constitute an acquittal for double jeopardy purposes and, as such, may be reconsidered up until the defendant's particular tribunal, the jury, is discharged.

3. First, trial judges presiding over jury trials have no authority to acquit or convict defendants because they are not entitled to resolve the facts. *United States* v. *Martin Linen Supply*, 430 U.S. at 572-73. Rulings on motions for directed verdicts are legal rulings, decided on the basis of governing law, with the facts deemed to be undisputed. *See Commonwealth* v.

Lowder, 432 Mass. 92, 96-97, 731 N.E.2d 510, 515 (2000); *see also Burks* v. *United States*, 437 U.S. 1, 16 (1978). At most, trial judges' mid-jury trial legal rulings granting directed verdicts can have the *effect* of acquittals, but only if such grants are followed by discharging the entity that has the authority to resolve the facts, *i.e.*, the jury. Second, mid-jury trial legal decisions granting motions for directed verdicts do not have the effect of acquittals because judges have longstanding power to reconsider their rulings while proceedings are pending. While states cannot diminish defendants' double jeopardy rights through their characterizations of state law, the fact that judges have such a well-established common law power to reconsider their decisions is relevant to considering what effect such legal rulings have on defendants.

4. This Court's decisions that legal rulings standing alone do not function as acquittals for purposes of the Double Jeopardy Clause are consistent with the notion that rulings on motions for directed verdict, in and of themselves, do not function as acquittals. On each occasion when this Court has determined that review of a legal ruling deeming the evidence insufficient violated the Double Jeopardy Clause, the judge was effectively acting as the factfinder, either because the jury had been discharged when the ruling was made, because the jury was discharged after the ruling was made, or because the defendant had waived his right to a jury. By contrast, this Court consistently has held that a judge's legal rulings that do not affect the factfinder's ability to weigh the evidence may be reviewed without violating the Double Jeopardy Clause. Even an appellate court's determination that a conviction is against the weight of the evidence is not a bar to retrial because an acquittal is not the only proper verdict that the factfinder could return. *Tibbs* v. *Florida*, 457 U.S. 31, 42 (1982). To be sure, this Court, recognizing that bench trials present the distinct, difficult issue that judges are both factfinders and law givers in that context, has treated legal rulings by judges presiding over bench trials as if they were factual

determinations for double jeopardy purposes. This approach, however, neither applies to jury trials nor detracts from the conclusion that trial judges presiding over jury trials may reconsider their legal rulings up until the jury is discharged.

5. The policies that animate the Double Jeopardy Clause are not offended by a conclusion that a trial judge may reconsider her mid-jury trial legal rulings. A trial judge's correction of an erroneous legal ruling made during a jury trial results in only one resolution of the facts, determined by the first and only jury impaneled and sworn for that purpose. The prosecution is not permitted the opportunity to "hone" an insufficient case; indeed, the legal correction is a recognition that the evidence is sufficient to send the charge to the jury. Treating these legal rulings as acquittals for double jeopardy purposes would have the deleterious effect of placing defendants against whom the evidence is sufficient outside the reach of the law and, hence, could tend to reduce the effectiveness of motions for directed verdict as a protection for criminal defendants. Any prejudice that defendants may suffer as a result of such reconsideration falls within the framework of due process and can be remedied, when necessary, by a new trial.

6. Smith's double jeopardy rights were not violated by the trial judge's exercise of her well-established common-law authority to reconsider her legal ruling erroneously granting his motion for required finding of not guilty. The evidence presented at Smith's trial was sufficient to send the charge to the jury; the trial judge's correction of her legal error permitted the sole factfinder to do its work. Smith was subjected to one trial before one jury. Jeopardy attached when Smith's jury was sworn, and that jeopardy terminated upon the jury's verdicts of guilty. Double jeopardy principles require nothing more.

ARGUMENT

A criminal defendant's right to have his guilt or innocence determined by a particular jury is at the core of the guarantee provided by the Double Jeopardy Clause. *See Arizona* v. *Washington*, 434 U.S. 497, 507-08 & n.23 (1978) (discussing jury value in historical context of English judges' dismissals of juries when it appeared they would acquit); *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949) (defendant has right to have case determined by "particular tribunal"). It is elemental, then, that the Double Jeopardy Clause protects an individual from being tried for the same offense after his particular jury has rendered a judgment of acquittal. *Ball* v. *United States*, 163 U.S. 662, 669 (1896); *see Price* v. *Vincent*, 538 U.S. 634, 641 (2003) (on habeas review, noting Michigan Supreme Court's recognition that acquittal bars second prosecution for same offense); *United States* v. *Wilson*, 420 U.S. at 347 (explaining that appellate review of acquittal barred because of risk of second trial after first finder of fact ruled in defendant's favor). This rule specifically protects a defendant from being placed in jeopardy twice. *Ball* v. *United States*, 163 U.S. at 669. At a jury trial, jeopardy attaches when the jury is sworn. *Crist* v. *Bretz*, 437 U.S. 28, 35 (1978) (citing *Downum* v. *United States*, 372 U.S. 734, 735-36 (1963)); *United States v. Martin Linen Supply*, 430 U.S. at 569; *Serfass v. United States*, 420 U.S. 377, 388 (1975). As a general matter, that jeopardy terminates when the original jury is discharged. *Green v. United States*, 355 U.S. 184, 191 (1957). Therefore, where a trial judge, during a jury trial, reconsiders her grant of a motion for directed verdict and submits the charge to the first and only jury sworn to render a verdict on the facts, the defendant has been subjected to only one jeopardy. The Double Jeopardy Clause does not preclude reconsideration of such a legal ruling, so long as the defendant's first jury remains sworn and available to conduct its work as the finder of fact.

THE DOUBLE JEOPARDY CLAUSE IS NOT VIOLATED BY A JUDGE'S RECONSIDERATION AND WITHDRAWAL OF A RULING ALLOWING A MOTION FOR DIRECTED VERDICT, AFTER WHICH THE ORIGINALLY IMPANELED JURY CONVICTS THE DEFENDANT.

I. The Double Jeopardy Clause Bars A Second Prosecution After A Defendant's "Particular Tribunal" Has Acquitted Him.

1. The Double Jeopardy Clause states: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.[6] The Clause is derived from the English common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon. As Blackstone noted, "the plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." 4 WILLIAM BLACKSTONE, COMMENTARIES *329, *quoted in Green* v. *United States*, 355 U.S. at 187. The Clause effectuates that maxim by generally requiring that a chosen jury be held together, a rule that derives from the "abhorrent practice" in England by which English judges discharged juries prior to verdict when the Crown's evidence appeared to be insufficient. *See Arizona* v. *Washington*, 434 U.S. at 507-08 & n.23 (discussing history resulting in requirement of manifest necessity to discharge jury before verdict reached).

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[6]The Double Jeopardy Clause has been incorporated into the Fourteenth Amendment and made applicable to the States. *Benton* v. *Maryland*, 395 U.S. 784, 794-95 (1969).

This Court has consistently emphasized that the particular danger the Clause is intended to guard against is successive prosecutions for the same offense. *See, e.g.*, *Sanabria* v. *United States*, 437 U.S. 54, 63 (1978) ("the primary purpose of the Double Jeopardy Clause was to prevent successive trials"); *United States* v. *Wilson*, 420 U.S. at 342 ("The development of the Double Jeopardy Clause from its common-law origins thus suggests that it was directed at the threat of multiple prosecutions . . . ."); *Stroud* v. *United States*, 251 U.S. 15, 18 (1919) ("The protection afforded by the Constitution is against a second trial for the same offense."). Historically, this prohibition of multiple prosecutions arises from two distinct, but related, concerns.

The first concern is that final factual determinations should be protected. The Double Jeopardy Clause works to preserve final judgments, whether of acquittal or conviction. As this Court observed in *Arizona* v. *Washington*, "[i]f the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair." 434 U.S. at 503; *see also United States* v. *Scott*, 437 U.S. 82, 92 (1978) (historically, "the primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment"); *Crist* v. *Bretz*, 437 U.S. at 33 (double jeopardy bar to second trial after judgment of acquittal or conviction akin to res judicata principles).

The second concern underlying the prohibition of multiple prosecutions is that the government not receive multiple chances to garner a conviction, either by improving its evidence or by finding a more sympathetic jury. Barring re-prosecution after a final judgment of acquittal guards against the "unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.'" *United States* v. *Scott*, 437 U.S. at 91 (quoting *Green* v. *United States*, 355 U.S. at 188). Nor is the prosecution permitted a second trial in order to hone a case that the first

factfinder has evaluated and rejected. *Tibbs* v. *Florida*, 457 U.S. at 41 ("'[the] Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.'" (quoting *Burks* v. *United States*, 437 U.S. at 11) (alteration in the original)).

The crucial link holding together the dual double jeopardy principles in favor of finality of judgments and against second trials is the constitutional value of the defendant's "right to have his trial completed by a particular tribunal." *Wade* v. *Hunter*, 336 U.S. at 689; *see Illinois* v. *Somerville*, 410 U.S. 458, 471 (1973) (in context of mistrial, "the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one."). Specifically, "[b]ecause jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's 'valued right to have his trial completed by a particular tribunal.'" *Arizona* v. *Washington*, 434 U.S. at 503 (quoting *Wade* v. *Hunter*, 336 U.S. at 689). Indeed, this Court has drawn the line for attachment of jeopardy in a jury trial at when the jury is impaneled and sworn in recognition of "the need to protect the interest of the accused in retaining a chosen jury." *Crist* v. *Bretz*, 437 U.S. at 35. As this Court has noted, "[t]hroughout that [Anglo-American system of criminal justice] history there ran a strong tradition that once banded together a jury should not be discharged until it had completed its solemn task of announcing a verdict." *Id.* at 36.

2. In light of the foregoing principles, double jeopardy jurisprudence accords special deference to a final judgment of acquittal. *Tibbs* v. *Florida,* 457 U.S. at 41; *Kepner* v. *United States*, 195 U.S. 100, 130 (1904). This is so because review of an acquittal "would expose the defendant to a risk of a second trial after the finder of fact had ruled in his favor in the first." *United States* v. *Wilson*, 420 U.S. at 346-47.

The key question then, in determining the effect of a trial judge's reconsideration of an order granting a motion for required

finding of not guilty, is what constitutes an acquittal for double jeopardy purposes. This Court has defined the parameters: "a trial court's ruling in favor of a defendant is an acquittal only if it 'actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.'" *Lee* v. *United States*, 432 U.S. at 30 n.8 (quoting *United States* v. *Martin Linen Supply*, 430 U.S. at 571). When a jury returns a not-guilty verdict, the answer is simple: the jury has resolved the facts in the defendant's favor and a second prosecution is barred by the Double Jeopardy Clause. *See United States* v. *Jenkins*, 420 U.S. 358, 366 (1975) ("the distinction between the jury's verdict of guilty and the court's ruling on questions of law is easily perceived"), *overruled on other grounds*, *United States* v. *Scott*, 437 U.S. at 87-88.

The matter is more complicated when one considers the effect of a trial judge's mid-trial reconsideration of a legal ruling granting a motion for directed verdict. For the reasons set forth below, a trial judge's order, made during a jury trial, granting a motion for directed verdict is not an "acquittal" for double jeopardy purposes and may be reconsidered up until the defendant's particular tribunal, *i.e.*, the jury, is discharged.

II. A Judge's Ruling Granting A Motion For Directed Verdict During A Jury Trial Is Not Effectively An Acquittal For Double Jeopardy Purposes If The Original Impaneled Jury Has Not Yet Been Discharged.

A. A trial judge presiding over a jury trial has no authority to resolve the facts either in favor of or against a defendant.

A trial judge, when she presides over a jury trial, has no authority to convict or acquit a defendant, because she does not have the authority to resolve the facts. *See United States* v.

Martin Linen Supply, 430 U.S. at 572-73 (citing *Sparf* v. *United States*, 156 U.S. 51, 105 (1895); *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 408 (1947)) (trial judge has no power to direct a jury to convict a defendant). A trial judge's ruling on a motion for directed verdict is a *legal* one, in which the facts are deemed to be undisputed. *See Commonwealth* v. *Lowder*, 432 Mass. at 96-97, 731 N.E.2d at 515 (motions for required finding present legal questions within trial judge's purview); *see also Burks* v. *United States*, 437 U.S. at 16 ("[T]he trial court, which has heard the testimony of witnesses firsthand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal.").[7]

The most a trial judge can do is issue an order that has the effect of an acquittal by granting such a motion and then discharging the factfinder, *i.e.*, the jury. The judge's power to do so, however, does not rest upon her mere legal ruling. The judge's ruling that the evidence is insufficient is final and acts as an acquittal only when the jury is discharged, because there no longer is an opportunity for the defendant's particular tribunal to

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[7]Indeed, prior to 1845, juries in Massachusetts were empowered to decide *both* the facts and the law in criminal trials. It was Chief Justice Shaw's decision in *Commonwealth* v. *Anthes*, 71 Mass. 185, 5 Gray 185 (1855), that conclusively determined "that the jury in criminal trials have no rightful power to determine questions of law against the instructions of the court." *Commonwealth* v. *Davis*, 271 Mass. 99, 100, 170 N.E. 924, 924 (1930); *see Galloway* v. *United States*, 319 U.S. 372, 399 n.5 (1943) (Black, J., dissenting) ("The early practice under which juries were empowered to determine issues of law in criminal cases was not formally rejected by this Court until 1894 in Sparf v. United States, 156 U.S. 51, when the subject was exhaustively discussed"). From that point up to today, a motion challenging the sufficiency of the evidence in Massachusetts is a legal matter within the trial judge's authority. *Commonwealth* v. *Lowder*, 432 Mass. at 97, 731 N.E.2d at 515.

weigh the evidence.[8] *See Sanabria* v. *United States*, 437 U.S. at 78 (because trial judge's erroneous legal ruling led to acquittal, double jeopardy barred retrial). So long as the jury remains impaneled and sworn, however, such a ruling cannot have the effect of an acquittal because the jury remains in place to serve as the ultimate, and indeed the only, factfinder.

B. A trial judge's mid-jury trial grant of a directed verdict does not have the effect of an acquittal because state law authorizes judges to reconsider their own decisions.

The reason that a trial judge's mid-jury trial grant of a directed verdict does not have the *effect* of an acquittal is that judges have the longstanding and well-established power to reconsider their own decisions. Although a state cannot undermine a defendant's rights under the Double Jeopardy Clause through its characterization of state law, *see Smalis* v. *Pennsylvania*, 476 U.S. 140, 144 n.5 (1986), state law nonetheless remains the background against which the Double Jeopardy Clause operates and is relevant to gauging the effect a judge's order has on a defendant.

In Massachusetts, "[a] judge's power to reconsider his own decisions during the pendency of a case is firmly rooted in the common law . . . ." *Commonwealth* v. *Haskell*, 438 Mass. 790, 792, 784 N.E.2d 625, 628 (2003). The boundaries for the exercise of this discretion are wide. A court's "inherent power . . . to rehear and reconsider its own determinations at its discretion has long been recognized," at least where reconsideration violates "no other provision of law." *Bradford* v.

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[8]For example, a Massachusetts trial judge has the power to direct a verdict as early as immediately after the prosecution delivers its opening statement, before any evidence has been presented at all. *Commonwealth* v. *Lowder*, 432 Mass. at 99, 731 N.E.2d at 517.

Knights, 427 Mass. 748, 752, 695 N.E.2d 1068, 1071 (1998); *see Commonwealth* v. *Downs*, 31 Mass. App. Ct. 467, 469, 579 N.E.2d 679, 681 (1991) ("Judges are not condemned to abstain from entertaining second thoughts that may be better ones"). Further, there are few time limits on a judge's exercise of this discretion. In fact, a Massachusetts court may reconsider a final order even after a notice of appeal has been filed. *See Commonwealth* v. *Cronk*, 396 Mass. 194, 197, 484 N.E.2d 1330, 1333 (1985) (court may reconsider until the appeal is entered in the appellate court). As the Supreme Judicial Court has noted, "[w]e are dealing with the power of a court that has general jurisdiction. It ought to be free to exercise that jurisdiction to the end that justice may be served." *Fine* v. *Commonwealth*, 312 Mass. 252, 260, 44 N.E.2d 659, 664 (1942) (judge had authority to vacate his initial order granting a motion for new trial, post-jury conviction).

This firmly rooted state law establishing that judges are empowered to reconsider their decisions means that legal rulings–such as grants of directed verdicts–do not have the effect of acquittals while the original jury remains impaneled.

C. This Court's rulings are consistent with the proposition that legal rulings alone–including grants of directed verdicts–do not function as acquittals for purposes of the Double Jeopardy Clause.

i. Rulings made after jury discharge have the effect of acquittals.

This Court's decisions, in which it found that the Double Jeopardy Clause barred second proceedings after a trial judge or an appellate court ruled that the evidence was insufficient to submit to a jury, demonstrate that such legal rulings have the effect of an acquittal only once the jury is discharged. This Court

has accorded the following scenarios similar deference as that owed a jury's not guilty verdict: (1) a trial judge's entry of an acquittal after the jury, which has failed to reach a verdict, is discharged, *United States* v. *Martin Linen Supply*, 430 U.S. at 575; (2) an appellate court's reversal of a jury's conviction based on insufficiency of the evidence, *Burks* v. *United States*, 437 U.S. at 17-18, and *Greene* v. *Massey*, 437 U.S. 19, 24-25 (1978); (3) a trial judge's grant, after a jury conviction, of a motion for new trial based on an assessment that the evidence was insufficient, *Hudson* v. *Louisiana*, 450 U.S. 40, 43 (1981); and (4) a trial judge's determination, when acting as the factfinder at a bench trial, that the evidence is insufficient, *Smalis* v. *Pennsylvania*, 476 U.S. at 141, 144-45.

In each of these scenarios, the jury could not function as the factfinder, either because it had been discharged when the judge issued the ruling on the sufficiency of the evidence, it was discharged after the ruling was made and the ruling was operative at that time, or the defendant had waived his right to a jury, making the judge the factfinder. Thus, the judges' rulings in each of these cases had the effect of acquittals. By contrast, when a judge, mid-jury trial, grants a motion for directed verdict, the jury remains the only and ultimate factfinder until it is discharged.

ii. Legal rulings that do not affect a factfinder's ability to weigh the evidence are not acquittals.

Where, as here, judges' legal rulings did not have the effect of acquittals, this Court has ruled that the Double Jeopardy Clause did *not* forbid second proceedings. For example, a trial judge's mid-trial legal ruling dismissing charges based on pre-indictment delay presented no bar to an appeal because it was a legal ruling unrelated to the strength of the prosecution's evidence. *United States* v. *Scott*, 437 U.S. at 98-99. Similarly, appeal of a trial judge's mid-trial grant of a defendant's motion to

dismiss an indictment for failure to state an offense was not barred because the mistrial was based upon a legal ruling unrelated to the strength of the evidence. *Lee* v. *United States*, 432 U.S. at 30-31; *see also Lockhart* v. *Nelson*, 488 U.S. 33, 40 (1988) (second trial permissible after appellate court holds that trial court committed legal error in admitting certain evidence at trial, even though the prosecution's evidence would be rendered insufficient by the exclusion of such evidence, because appellate court's threshold determination is legal ruling unrelated to the strength of the evidence).

Finally, it bears mentioning that this Court has held that even a factual determination by an appellate court that prompted it to overturn a conviction did not bar a second trial. In *Tibbs* v. *Florida*, the Court held that the Double Jeopardy Clause did not bar retrial after a state appellate court reversed a conviction on the ground that the conviction was against "the weight of the evidence." 457 U.S. at 42-45. In contrast to an appellate court's holding that the evidence was legally insufficient, a holding that a guilty verdict is against the weight of the evidence "does not mean that acquittal was the only proper verdict." *Id.* at 42. In other words, like the trial judge's ruling on the motion for directed verdict in this case, the appellate court's holding in *Tibbs* did not have the effect of definitively resolving the factual dispute in the case. The Double Jeopardy Clause therefore presented no bar to a second trial.

D. This Court's decisions in bench trial cases are not to the contrary.

The cases that Smith cites to this Court concerning bench trials do not detract from the soundness of a conclusion that a trial judge presiding over a jury trial may reconsider legal rulings made while the jury is impaneled and sworn. Bench trials present a distinct, difficult issue not present in the jury-trial context. In a bench trial, both the factfinding and law-giving functions "are

combined in the judge, and a general finding of 'not guilty' may rest either on the determination of facts in favor of a defendant or on a resolution of a legal question favorably to him." *United States* v. *Jenkins*, 420 U.S. at 366-67, *overruled on other grounds*, *United States* v. *Scott*, 437 U.S. at 87-88. The inherent difficulty in separating a judge's dual roles in a bench trial has caused this Court to treat some legal rulings as if they were factual determinations for double jeopardy purposes. This doctrine, however, has no applicability in a jury trial.

For example, in *Smalis* v. *Pennsylvania*, the trial judge at a bench trial entered an order that, "[a]s the trier of fact and law," he found the evidence to be insufficient. 476 U.S. at 141. A decision by an appellate court reversing this determination, even if labeled as a legal decision, would effectively be an order to the factfinder to reconsider his factual determination. Such factual oversight implicates double jeopardy concerns, and this Court found as much. *Id.* at 145 (citing *Arizona* v. *Rumsey*, 467 U.S. 203, 211-12 (1984)); *see Price* v. *Vincent*, 538 U.S. at 640 (not only final judgment, but also an appeal raised the double jeopardy spectre).

Jeopardy attaches at a bench trial when the court begins to receive evidence. *Serfass* v. *United States*, 420 U.S. at 388. After the trial judge makes a determination that the evidence is insufficient "as the trier of fact," a determination by the appellate court that the evidence was sufficient would necessarily result in "further proceedings" before the trial judge to resolve the factual issues. In the bench trial context, receipt of such further evidence indeed would constitute a second jeopardy.

As such, this Court's admonition against "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged," *United States* v. *Jenkins*, 420 U.S. at 370, can be understood only in the context of a bench trial. *Smalis* v. *Pennsylvania*, 476 U.S. at 141, 146 (bench trial); *United States* v. *Jenkins*, 420 U.S. at 370 (bench trial); *see United States* v. *Martin Linen Supply*, 430 U.S. at 570,

575-76 (trial judge effectively acted as factfinder at bench trial by acquitting defendant after jury discharged due to mistrial). Because jeopardy attaches in a bench trial when the court begins to receive evidence, review of a trial judge's actual determination of the facts in the defendant's favor would result in a second jeopardy. In context, the phrase "further proceedings," along with the fact that the germane traditional protection afforded by the Double Jeopardy Clause is against second determinations of the facts, does not mean that a trial judge is precluded from reversing her own legal ruling in the midst of a trial by jury.

III. The Policies Underlying The Double Jeopardy Clause Support A Trial Judge's Authority To Reconsider A Ruling, Made Mid-Jury Trial, Granting A Motion For Directed Verdict.

A. Double jeopardy policies support this understanding of what constitutes an acquittal.

Sound policy considerations concerning the interests of both criminal defendants and the public good support this understanding of what constitutes an acquittal for purposes of the Double Jeopardy Clause. None of the bedrock double jeopardy principles–the value of retaining a chosen jury, the respect for final judgments, and the protection against second trials–is offended when a trial judge corrects an erroneous legal decision to remove a charge from the jury's consideration before that jury is discharged from its duty as the finder of fact. No second trial occurs when a trial judge, as in this case, reconsiders a mid-trial legal determination and ultimately submits the charge to the first and only jury impaneled and sworn to determine the facts: the defendant has been placed in jeopardy only once. *See Crist* v. *Bretz*, 437 U.S. at 35 (jeopardy attaches when jury sworn); *Green* v. *United States*, 355 U.S. at 191 (jeopardy terminates when jury discharged). And, the defendant's "valued right to have his trial

completed by a particular tribunal" is fully honored. *Wade* v. *Hunter*, 336 U.S. at 689.

Further, allowing a trial judge to reconsider a legal ruling and submit the charge to the first and only jury sworn to weigh the facts "is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed; rather, it serves the interest of the defendant by affording him an opportunity to 'obtai[n] a fair []adjudication of his guilt free from error.'" *Lockhart* v. *Nelson*, 488 U.S. at 42 (in the context of permitting retrial after appellate court's reversal for legal error, which rendered evidence at trial insufficient) (quoting *Burks* v. *United States*, 437 U.S. at 15). Correction of such a legal error after the close of the prosecution's case (and each such reconsideration is a legal correction because it is by nature a legal ruling) does not permit the government to "hone" an insufficient case. Where such a ruling is not a final determination based on a resolution of the facts adduced by the prosecution, and where the evidence is sufficient to send the charge to the finder of fact, permitting reconsideration is fully consonant with double jeopardy principles.

Additionally, in this context, the final judgment entitled to value is the jury's determination of guilt or innocence, based upon its resolution of the facts presented at trial. The jury is the finder of fact committed to weighing and resolving the facts as to the elements of the offense charged. Permitting a trial judge's reconsideration of a legal ruling up until that finder of fact is discharged ensures that "each defendant shall be subject to a just judgment on the merits of his case." *United States* v. *Scott*, 437 U.S. at 101.

As shown by the facts of this case, trial judges are often called upon to render these legal decisions quickly, without the ability to devote considerable thought to what may be a complex

matter.[9] Certainly, "an acquittal on the merits bars retrial even if based on legal error." *Arizona* v. *Rumsey*, 467 U.S. at 211. That fact, along with the time constraints that necessarily adhere to any assessment of the legal merits of a non-constitutionally mandated motion for required finding of not guilty, militates in favor of providing a trial judge with broad discretion to reconsider granting such a motion in order to correct a legal error up until the jury is discharged. The Double Jeopardy Clause's drastic remedy should not be invoked where, as here, there has been no "'abuse' of the trial process resulting in prejudice to the accused, by way of harassment or the like, such as to outweigh society's interest in the punishment of crime." *United States* v. *Jorn*, 400 U.S. 470, 492 (1971) (Stewart, J., dissenting).

Finally, precluding reconsideration of such legal rulings and effectively mandating that the granting of such motions amounts to a "magic open sesame," *Fong Foo* v. *United States*, 369 U.S. 141, 144 (1962) (Clark, J., dissenting), would injure the public good by inappropriately putting outside the reach of the law those criminal defendants against whom the evidence is sufficient to be considered by a jury. Such an approach violates the corresponding value under double jeopardy jurisprudence permitting the government "one full and fair opportunity to convict those who have violated its laws." *Ohio* v. *Johnson*, 467 U.S. 493, 502 (1984) (citing *Arizona* v. *Washington*, 434 U.S. at 509). Indeed, a rule that reconsideration of a legal ruling is not available when the evidence is in fact sufficient would be a "wooden interpretation [that] would distort the purposes of the constitutional provision to the prejudice of society's legitimate interest in convicting the guilty." *Green* v. *United States*, 355 U.S. at 204-05 (Frankfurter, J., dissenting).

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[9]Under Massachusetts Rule of Criminal Procedure 25, the trial judge did not have the authority to reserve judgment on the motion: she was required to decide it immediately.

B. A rule precluding reconsideration might remove the motion for directed verdict as a protection available to criminal defendants.

Unlike the defendant's valued right to have his case submitted to his particular tribunal, a motion for required finding of not guilty is not constitutionally mandated. It is a tool that states, and the federal government, choose to provide to defendants, and which gives defendants an additional chance at obtaining an acquittal with no potential downside. *See Galloway* v. *United States*, 319 U.S. 372, 403 (1943) (Black, J., dissenting) (in civil cases, "[u]nder the directed verdict practice, the moving party takes no such chance, for if his motion is denied, instead of suffering a directed verdict against him, his case merely continues into the hands of the jury."). If the trial judge denies the motion, or reconsiders an order allowing it, the defendant retains his valued right to submit the case to his particular tribunal, the sworn jury, with the possibility that the finder of fact will render a judgment of acquittal. *Cf. United States* v. *Jorn*, 400 U.S. at 484 (re-prosecution after successful appeal has not deprived defendant "of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal").

If a trial judge's initial grant of a motion for required finding is deemed to be an "acquittal" for double jeopardy purposes, however, this may present a threat to the continued practical use of such motions as part of a criminal defendant's arsenal of protections. A trial judge may very well be reluctant to grant such a motion where a possible legal mistake, as occurred in this case, will incorrectly take the defendant outside the reach of the law. This Court observed, in the context of mistrial motions, that if the rule were that the Double Jeopardy Clause barred a retrial whenever a judge granted a defendant's request for a mistrial, "the judge presiding over the first trial might well be more loath to grant a defendant's motion for mistrial." *Oregon* v. *Kennedy*, 456 U.S. 667, 676 (1982). Likewise, in *Tibbs* v.

Florida, this Court stated that holding the Double Jeopardy Clause bars retrial after a state appellate court reverses a conviction on the ground that the conviction was against the weight of the evidence "might prompt state legislatures simply to forbid [appellate] courts to reweigh the evidence" and "might also lead to restrictions on the authority of trial judges to order new trials based on their independent assessment of evidentiary weight." 457 U.S. at 45 n.22.

The same concern is present with respect to motions for directed verdicts. The rule advocated by Smith might effectively thwart the very purpose that motions for directed verdict are intended to serve: to cull from juries those charges that are insufficient as a matter of law.

C. The Due Process Clause, not the Double Jeopardy Clause, is implicated by a defendant's contention that he suffered prejudice due to a judge's reconsideration of a legal ruling.

A defendant's experience of being tried for an offense necessarily is fraught with anxiety and uncertainty. The Double Jeopardy Clause, however, does not protect criminal defendants from all such unpleasant feelings. It protects only a defendant's settled expectations concerning final judgments that have resolved the facts of charged offenses in his favor. The fact that a trial judge's reconsideration of a legal ruling may change the landscape of the trial, even dramatically, is no different from numerous crucial rulings the court might make in the trial process.

To be sure, the judge's reconsideration of her legal order granting a motion for required finding may unfairly prejudice the defendant under certain circumstances. Such prejudice, however, is a variety of legal error that falls within the rubric of due process, not within that of governmental oppression prohibited by

the Double Jeopardy Clause. *Cf. Green* v. *United States*, 355 U.S. at 215 (Frankfurter, J., dissenting) (interpretation of Due Process Clause requires courts "to weigh considerations generated by changing concepts as to minimum standards of fairness"). Such due process prejudice can be corrected when necessary by the remedy of a new trial. *See United States* v. *Hollywood Motor Car Co., Inc.*, 458 U.S. 263, 268 (1982) (in absence of double jeopardy violation, providing new trial "free of prejudicial error" adequate to vindicate accused's constitutional rights). Because the judge's legal ruling allowing a motion for directed verdict made during a jury trial does not constitute an acquittal, there is no reason to remove the defendant from the reach of the criminal laws and thereby thwart the public's interest in one full and fair opportunity to convict a person who has violated those laws.

IV. Smith's Conviction Of Unlawful Possession Of A Firearm By The First And Only Jury Impaneled And Sworn Did Not Violate The Double Jeopardy Clause.

Applying the above principles to the facts of this case, Smith's conviction for unlawful possession of a firearm did not violate the Double Jeopardy Clause. Smith filed a motion for a required finding of not guilty under Massachusetts Rule of Criminal Procedure 25, which is a codification of the common law motion for directed verdict. *See* MASS. R. CRIM. P. 25, Reporter's Notes (rule "does not presume to alter practice as it has developed relative to the directed verdict"). The trial judge initially granted Smith's motion for required finding based upon an erroneous understanding of the applicable law. Because Smith argued that the prosecution must provide direct evidence of the length of the gun barrel, and did not cite the Supreme Judicial Court's decision that circumstantial evidence (as was undisputedly presented here) would suffice, the trial judge

incorrectly granted the motion.[10] The prosecution's evidence concerning the length of the gun barrel Smith used to shoot Christopher Robinson was sufficient as a matter of Massachusetts law to send the charge to the jury. Robinson testified quite plainly that Smith shot him with "[a] pistol," "a revolver," "a .32 or a .38." J.A. 12, 13, 14, 16-17.[11]

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[10]As noted, under MASS. R. CRIM. P. 25, the trial judge did not have the authority to reserve judgment on the motion; she was required to decide it immediately. *See infra*, page 22 n.9. Despite this requirement that the motion be decided immediately, the trial judge's lengthy discussions with counsel in reconsidering her initial decision demonstrate that the legal question was one that required some thought and reflection. J.A. 20-22, 71-74, 81-89.

In fact, acknowledging that the legal question might require further thought, the prosecutor, during this reconsideration hearing, specifically suggested that the judge submit the charge to the jury and, in the event of a conviction, grant the motion for required finding at that point if she ultimately determined that the law required it. J.A. 74. The trial judge agreed with that approach, but before the jury's conviction, denied the motion for required finding. J.A. 92.

[11]Smith makes a point of noting that the trial judge, in initially granting his motion for a required finding, stated that there was not a "scintilla" of evidence to support proof of the gun barrel's length. *See* Br. for Pet'r, page i. Read, however, in the context of both the discussions that the judge had with counsel and the basis of the motion for required finding (*i.e.*, that direct, as opposed to indirect, evidence of the gun barrel's length needed to be adduced by the Commonwealth), it is plain that she was referring to the absence of direct evidence of gun-barrel length, not a complete absence of evidence on an element of the crime. The judge herself confirmed this during the discussion which led to her reconsideration. In discussing *Commonwealth* v. *Sperrazza*, 372 Mass. 667, 363 N.E.2d 673 (1977), the judge stated: "[t]he long and short of [*Sperrazza*] is that . . . the Commonwealth doesn't have to put in any evidence. The jury can infer the length of it based upon the type of instrument." J.A. 72. Although she again used a phrase that could be construed as meaning a complete absence of evidence as to an element, she then tied it back to the ruling of *Sperrazza*, which states that indirect evidence of gun-barrel length, that is, through testimony concerning "the type of

As discussed earlier, under Massachusetts common law it is well established that trial judges possess the authority to reconsider decisions made during the pendency of a proceeding. *See Commonwealth* v. *Haskell*, 438 Mass. at 792, 784 N.E.2d at 628; *Fine* v. *Commonwealth*, 312 Mass. at 258-60, 44 N.E.2d at 663-64. The trial judge, upon her realization that she made a legal error in granting the motion, exercised that authority, withdrew the ruling, and permitted the sole factfinder, *i.e.*, the jury, to do its work. As the Massachusetts Appeals Court found, because the trial judge simply reconsidered her legal ruling granting the motion for required finding, there was no second proceeding necessary. J.A. 125.

Indeed, none of the participants at Smith's trial found the judge's exercise of her common-law power of reconsideration at all remarkable. The record is bereft of any discussion or concern that the trial judge did not have the power to reconsider her legal ruling. Certainly neither the prosecutor nor Smith's counsel believed that the judge's rulings were final, as both argued for reconsideration: the prosecutor argued, successfully, for the judge's reconsideration of her ruling allowing the motion; and Smith's counsel argued, unsuccessfully, for reconsideration of her subsequent ruling denying the motion for required finding. Not one person who had a role to play in considering, arguing, or ruling on Smith's motion for required finding believed that the trial judge's rulings could not be reconsidered. This is entirely understandable given well-established Massachusetts law.[12]

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instrument" used, will suffice. 372 Mass. at 670, 363 N.E.2d at 675.

[12]As such, one cannot attach any particular significance to the facts that the trial judge's three separate decisions were marked on the face of the motion (the first two marked by the clerk and the last marked by the judge herself) and that all three decisions ultimately were entered on the docket. In any event, both procedures are routine matters of practice in the Massachusetts courts; a review of the docket in this case demonstrates the practice that each

Accordingly, the trial judge never "acquitted" Smith for double jeopardy purposes. Instead, at the point that Smith's motion for required finding was erroneously allowed as a matter of law, "[h]e was . . . neither acquitted nor convicted, because he himself successfully undertook to persuade the trial court not to submit the issue of guilt or innocence to the jury which had been impaneled to try him." *See United States* v. *Scott*, 437 U.S. at 99.

Further, all the policies underlying the Double Jeopardy Clause were served in this case. Melvin Smith was not "'deprived' of his valued right to go to the first jury." *Id.* at 100. One jury was sworn, one jury deliberated as to the facts, and one jury returned a verdict of guilty. Smith was subjected to one jeopardy, and that jeopardy terminated after the jury was discharged. As such, it cannot be said that Smith was "worn down" by the prosecution's presentation of its case to only one jury.

The trial judge's own reversal of her purely legal ruling that the evidence was insufficient, which was based upon a misunderstanding of the legal principles at issue, did not implicate the double jeopardy concern of a second trial. *Cf. Lockhart* v. *Nelson*, 488 U.S. at 40 (no double jeopardy bar to retrial on appellate court's reversal based upon legal error, which error rendered the evidence insufficient at the first trial). At that point, the "'criminal proceedings against [Smith had] not run their full course,'" *see Justices of the Boston Mun. Ct.* v. *Lydon*, 466 U.S. 294, 308 (1984) (quoting *Price* v. *Georgia*, 398 U.S. 323, 326 (1970)), and Smith's jeopardy continued as to his indictment for unlawful possession of a firearm. The public's interest in punishing those who violate its laws was vindicated by presenting a factually sufficient case to the jury originally impaneled and sworn to decide the matter.

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action taken in a matter is reflected on the docket. J.A. 1-8.

Finally, there are no due process prejudice concerns presented by this case. Upon the judge's correction of her legal error, Smith himself did not demonstrate a belief that his right not to be placed twice in jeopardy was violated, as he neither objected to the trial judge's decision to submit the charge to the jury nor requested that the case be re-opened in order that he might introduce evidence.[13] At no point did he make a demonstration of how his trial strategy would have been any different had the judge not made her initial ruling.[14] As a result, the case

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[13]Smith did not present to the Supreme Judicial Court his complaint about the Appeals Court's statement that he was given an "opportunity to reopen" his case. *See* Br. for Pet'r, page 34. He also neglected to present it in his certiorari petition. As such, it is not a matter for which this Court granted certiorari. *See Youakim* v. *Miller*, 425 U.S. at 234; SUP. CT. R. 14.1(a) ("[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court"). In any event, the record demonstrates the far more salient fact about this portion of the trial: Smith himself accepted the judge's reconsideration without question or comment, never asking to present evidence in light of the judge's reconsideration of her ruling. Indeed, the trial judge made it clear that she would have allowed the defendant to reopen his case had he so requested. J.A. 109.

[14]Because Smith never presented to the Massachusetts Appeals Court his current claim that his strategy in presenting evidence at trial might have been different had the judge not initially allowed his motion for required finding, it should not be considered here. *Compare* J.A. 114-19 *with* Br. for Pet'r, pages 35-37.

Smith also did not present to the Massachusetts Supreme Judicial Court the argument, made for the first time in his brief here, that the Appeals Court conducted an improper "prejudice" analysis of his double jeopardy claim. *See* Br. for Pet'r, pages 32-37. Neither did he make this argument in his certiorari petition. Accordingly, that legal issue is not one that is properly contained within the question presented for the Court's decision in this case. *Youakim* v. *Miller*, 425 U.S. at 234; SUP. CT. R. 14.1(a). In any event, the Appeals Court's prejudice analysis properly focused only on whether Smith was entitled to a new trial concerning his state-law argument that reconsideration of the ruling violated MASS. R. CRIM. P. 25. *See* J.A. 125-27.

proceeded as if the trial judge had correctly denied the motion at the outset. This Court's admonition, made in an analogous context regarding correction of legal errors, applies here: Smith had "'no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.'" J.A. 125 (quoting *United States* v. *Wilson*, 420 U.S. at 345). The Massachusetts Appeals Court's decision affirming Smith's conviction of unlawful possession of a firearm should be affirmed.

CONCLUSION

For the reasons stated above, Massachusetts requests that this Court affirm the judgment of the Massachusetts Appeals Court.

Respectfully submitted,

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